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# Abd Rahim bin Abd Rahman & Ors v DMD Industries Sdn Bhd & Ors (Kamariah bt Hamdan & Ors, third party)

HIGH COURT (MUAR) — CIVIL SUIT NO 22–29 OF 2000
AHMADI ASNAWI J
5 NOVEMBER 2010

*Civil Procedure — Third party proceedings — Action by bank against former solicitors in negligence — Striking out application by partners of firm to strike out action — Whether action time barred — Whether cause of action accrued when loan was disbursed by second defendant bank or when plaintiffs commenced action against second defendant — Limitation Act 1953 s 6(1)*

The Arab-Malaysian Bank Bhd ('the second defendant') granted the first defendant banking facilities amounting to RM8.4m on 9 January 1997. The facilities were secured, inter alia, by a legal charge over three plots of land ('the land) registered in the names of three individuals ('the plaintiffs'), who had granted the first defendant a power of attorney ('PA'). The land was charged to the second defendant bank by the first defendant pursuant to this PA. When the plaintiffs discovered that their lands were charged they commenced an action against the first and second defendants and three others claiming that the land was charged fraudulently and in breach of the provisions of the PA. As against the second defendant bank the plaintiffs sought, inter alia, to annul and set aside or cancel the said charge on the grounds that the charges were void and therefore not indefeasible. The action against the second defendant bank was heard and disposed of in favour of the plaintiffs. The second defendant bank then commenced third party proceedings against their former solicitors, Tetuan Mah-Kamariyah & Partners ('the law firm') in negligence. The second defendant claimed that it had disbursed the sum of RM8.4m to the first defendant upon the alleged negligence of Kamariah bt Hamdan and Yap Siew Bee ('the two partners'), the partners of the law firm, in relation to the taking of the charges and that the loss and damages it suffered as a result thereof was due to the negligence of these two partners and/or the firm. The two partners applied to strike out the second defendant's claim against them on the grounds that the second defendant's third party claim was time barred pursuant to s 6(1) of the Limitation Act 1953 ('the Act'). The deputy registrar dismissed the two partners' application with costs. This was the two partners' appeal against that decision. The two partners contended that the alleged cause of action arose when the second defendant had disbursed the RM8.4m loan on 9 January 1997 and that more than six years had lapsed since the accrual of the alleged cause of action to the filing of the third party proceedings in 2006. As such, the two partners' submitted that the second defendant's claim was time barred. The

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second defendant submitted that the third party claim was not time barred as the cause of action only arose from the time when the plaintiffs commenced an action against the second defendant on 25 May 2000.

**Held**, allowing the appeal with costs:

> The damage suffered by the second defendant occurred at the time the loan was disbursed to the first defendant, ie on 9 January 1997, for it was precisely at that point of time that the breach of the duty of care occurred. On 9 January 1997, the second defendant disbursed a loan of RM8.4m without a security backing or an indefeasibility of their interest over the land or charges. This was the damage suffered by the second defendant in consequence of acting upon the negligence of the two partners. Correspondingly, the second defendant's cause of action against the two partners was complete upon the disbursal of the loan. As such, the second defendant's cause of action for negligence, which would have accrued on 9 January 1997 was time barred pursuant to s 6(1) of the Act and obviously unsustainable (see paras 14 & 16).

**[Bahasa Malaysia summary**

Arab-Malaysian Bank Bhd ('defendan kedua') telah memberikan fasiliti perbankan kepada defendan pertama berjumlah RM8.4 juta pada 9 Januari 1997. Fasiliti tersebut dicagarkan, antara lain, dengan gadaian ke atas tiga bidang tanah ('tanah-tanah tersebut') didaftarkan di bawah nama tiga orang ('plaintif-plaintif') yang memberikan surat kuasa wakil kepada defendan pertama ('SKW'). Defendan pertama telah menggadaikan tanah tersebut kepada bank defendan kedua berikutan SKW. Apabila plaintif-plaintif menyedari bahawa tanah-tanah tersebut telah digadaikan, mereka memulakan tindakan terhadap defendan pertama dan kedua dan tiga yang lain mendakwa bahawa tanah tersebut telah digadaikan secara fraud dan bercanggah dengan peruntukan-peruntukan SKW. Plaintif-plaintif menuntut daripada defendan kedua, antara lain, agar membatalkan dan mengenepikan atau membatalkan gadaian tersebut atas alasan bahawa gadaian tersebut tidak sah dan dengan itu, tidak boleh disangkal. Tindakan terhadap bank defendan kedua didengar dan ditolak, berpihak kepada plaintif-plaintif. Bank defendan kedua kemudiannya memulakan prosiding pihak ketiga terhadap bekas peguamcara mereka iaitu Tetuan Mah-Kamariyah & Partners ('firma guaman tersebut') kerana kecuaian. Defendan kedua menghujahkan bahawa dia telah membayar jumlah RM8.4 juta kepada defendan pertama berikutan dakwaan kecuaian Kamariah bt Hamdan dan Yap Siew Bee ('kedua-dua rakan kongsi'), rakan-rakan kongsi firma guaman, berkaitan pengambilan gadaian dan akibat kerugian yang ditanggung adalah disebabkan kecuaian kedua-dua rakan kongsi dan/atau firma. Kedua-dua rakan kongsi telah memohon untuk membatalkan tuntutan defendan kedua atas alasan bahawa tuntutan pihak ketiga defendan kedua telah dihadkan oleh masa menurut s 6(1) Akta Had Masa 1953 ('Akta').

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Timbalan pendaftar menolak permohonan kedua-dua rakan kongsi dengan kos. Ini adalah rayuan kedua-dua rakan kongsi terhadap keputusan tersebut. Kedua-dua rakan kongsi menghujahkan bahawa kausa tindakan tersebut terakru apabila defendan kedua membayar pinjaman RM8.4m pada 9 Januari 1997 dan bahawa lebih enam tahun telah berlalu sejak kausa tindakan tersebut terakru bagi pemfailan prosiding pihak ketiga pada tahun 2006. Dengan itu, kedua-dua rakan kongsi menghujahkan bahawa tuntutan defendan dihadkan oleh masa. Defendan kedua menghujahkan bahawa tuntutan pihak ketiga tersebut tidak dihadkan oleh masa kerana kausa tindakan hanya terakru apabila plaintif-plaintif memulakan tindakan terhadap defendan kedua pada 25 Mei 2000.

**Diputuskan**, membenarkan rayuan dengan kos:

> Kerugian yang dialami oleh defendan kedua berlaku ketika pinjaman tersebut dibayar kepada defendan pertama, contohnya pada 9 Januari 1997, kerana tepat pada masa itu berlakunya pelanggaran kewajipan berhati-hati. Pada 9 Januari 1997, defendan kedua membayar pinjaman RM8.4 juta tanpa cagaran atau ketakbolehan disangkal ke atas tanah atau gadaian. Ini adalah kerugian yang dialami oleh defendan kedua akibat daripada tindakan atas kecuaian kedua-dua rakan kongsi. Berikutan itu, kausa tindakan defendan kedua terhadap kedua-dua rakan kongsi lengkap apabila pembayaran pinjaman. Dengan itu, kausa tindakan defendan kedua bagi kecuaian, telah terakru pada 9 Januari 1997 telah dihadkan oleh masa menurut s 6(1) Akta dan jelas sekali, tidak disokong (lihat perenggan 14 & 16).]

**Notes**

For cases on third party proceedings generally, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 8613–8637.

**Cases referred to**

*Costa v Geoghiou* [1984] NLJR 82, CA (folld)
*DW Moore & Co Ltd v Ferrier* [1988] 1 WLR 267, CA (folld)
*Melton v Walker and Stanger* (1981) 125 Sol Jo 861 (folld)

**Legislation referred to**

Limitation Act 1953 s 6(1)

*Maziah bt Md Yamin (Chee Siah Le Kee & Partners) for the plaintiffs/appellants.*
*Justin Ter (Skrine) for the respondents.*

**Ahmadi Asnawi J:**

**[1]** The first and second third parties applied by summons in chambers

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(encl 196) to strike out the second defendant's third party proceedings against them. Their affidavit in support is encl 197; the second defendant's affidavit in reply is encl 207; and the first and second third parties further affidavit in reply is encl 216.

**[2]** The said application was dismissed with costs by the learned deputy registrar on 14 August 2008. The said order is encl 221. Hence this appeal (encl 217) before the judge in chambers by the first and second third parties against the said order of the learned deputy registrar.

FACTS IN BRIEF

**[3]** The second defendant granted to the first defendant banking facilities amounting to RM8.4m pursuant to a loan agreement dated 9 January 1997.

**[4]** The said facilities were secured, inter alia, by a third party first legal charge over three plots of land known as lot No 713 EMR 325, lot No 672 EMR 294 and lot No 678 EMR 1692, all in the Mukim of Jalan Bakri, district of Muar, Johor. These plots were registered in the names of the plaintiffs.

**[5]** The said lands were charged to the second defendant, executed by the first defendant on behalf of the plaintiffs pursuant to a power of attorney ('PA') given by the plaintiffs in favour of the first defendant. The charges were duly registered with the relevant land office and the facilities (RM 8.4m) were disbursed by the second defendant to the first defendant on 9 January 1997.

**[6]** The plaintiffs then commenced an action against all the five defendants claiming that the lands were charged fraudulently and in breach of the provisions of a joint venture agreement between the plaintiffs and the first defendant and also in breach of the provisions of the PA and sought against the first, third, fourth and fifth defendants, inter alia, that the charges were void and therefore are not indefeasible. As against the second defendant the plaintiffs sought, inter alia, to annul and set aside or cancel the said charges. The action against the second defendant was heard and disposed on 17 November 2009 in favour of the plaintiffs.

**[7]** By their third party proceedings the second defendant claims an indemnity from their former solicitors (Tetuan Mah-Kamariyah & Partners, of which the first and second third parties are partners of the said firm) on the ground that they had relied upon the alleged negligence of the first and second third parties in relation to the taking of the charges and the disbursement of the

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RM8.4m. In the alternative the second defendant prayed that the first and second third parties repay them the RM8.4m with interest. The second defendant's cause of action is grounded upon the tort of negligence.

GROUNDS OF APPLICATION — ENCL 196

**[8]** The first and second third parties submitted that assuming that the first and second third parties were indeed negligent, however the third party claim by the second defendant is time barred pursuant to s 6(1) of the Limitation Act 1953. The RM8.4m loan was disbursed on 9 January 1997 and more than six years have lapsed since the accrual of the alleged cause of action prior to the filing of the third party proceedings in 2006.

THE SECOND DEFENDANT'S CONTENTION

**[9]** The cause of action against the first and second third parties accrued only upon the issuance of the summons by the plaintiffs against the second defendant on 23 May 2000. The third party claim is hence not time barred as the second defendant had filed the said third party proceedings on 20 January 2006.

ISSUE

**[10]** Whether the cause of action against the first and second third parties accrue at the time the RM8.4m was disbursed by the second defendant to the first defendant on 1 September 1997 or at the time the plaintiffs commenced action against the second defendant on 25 May 2000.

**[11]** Correspondingly if the cause of action in fact accrued on 1 September 1997, the second defendant's claim against the third parties is obviously time barred.

FINDINGS

**[12]** The second defendant's claim against their former solicitors is grounded upon the tort of negligence. In order to succeed the second defendant must show that the first and second third parties who have been alleged to have been negligent owed him a duty of care, that they breached that duty and that the breach caused damage to the second defendant. Only then the cause of action for negligence would accrue.

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**[13]** Since the first and second defendants have applied to strike out the third party proceedings against them on the ground that limitation has set in, it must then be assumed that the tort has been made out. Hence the next question is when did the second defendant suffer the said damage? A

**[14]** In my view the damage suffered by the second defendant occurred at the time the said loan was disbursed to the first defendant for it was precisely at that point of time that the breach of duty of care took place when the second defendant acted upon the negligence of the first and second third parties. On the day the loan was disbursed to the first defendant (on 1 September 1997), the second defendant merely obtained a right to be repaid the sums owing to them by the first defendant without a security backing or an indefeasibility of their interest over the said lands/charges. This was a far cry from what they have intended when they entered into the loan agreement with the first defendant. This was the damage suffered by the second defendant inconsequence of acting upon the negligence of the first and second third parties. Correspondingly, the second defendant's cause of action against both the third parties would accrue upon the said damage being cause as a result of the said negligence. B C D

**[15]** There can be no doubt that this was a quantifiable damage depending upon the conduct of the first defendant and the plaintiffs' next course of action. As from the date the loan (RM8.4m) was disbursed, the second defendant's cause of action against the first and second third parties was complete because at the date the second defendant had suffered damage. Equally, irrespective of the plaintiffs' next course of action, the second defendant's cause of action against their former solicitors (first and second third parties) was complete upon disbursal of the said loan. Neither was it dependent upon the date the second defendant was sued by the plaintiffs. E F

**[16]** I am fortified in my aforesaid finding by the decisions in *Melton v Walker and Stanger* (1981) 125 Sol Jo 861, *Costa v Geoghiou* [1984] NLJR 82 and *DW Moore & Co Ltd v Ferrier* [1988] 1 WLR 267. In each of these cases the plaintiffs acted on the negligent advice of their solicitors or executed documents negligently drafted by their solicitors and it was decided therein that the damage occurred the moment the plaintiffs acted upon the negligent advice of their solicitors although they discovered the negligence much later and although the losses could not be exactly quantified. Applying the same principles, the second defendant's cause of action for negligence would have accrued on 9 January 1997. In such event it is very apparent that the second defendant's claim against the first and second third parties is time barred pursuant to s 6(1) of the Limitation Act 1953 and obviously unsustainable. The RM8.4m was disbursed on 9 January 1997 and more than six years have lapsed since the accrual of the cause of action prior to the filing of the third party proceedings in 2006. G H I

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**[17]** Accordingly I allowed the first and second third parties' appeal and allowed their prayers in terms of their application vide encl 196 with costs.

*Appeal allowed with costs.*

Reported by Kohila Nesan